83-570

No. ..-....

IN THE

Supreme Court of the United States

October Term, 1983

REVEREND W. EUGENE SCOTT, PH.D.,

Petitioner,

vs.

JOEL ROSENBERG, WILLIAM B. RAY, JEFFREY MALICKSON, WALLACE JOHNSON, and ARTHUR L. GINSBERG,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Questions Presented.*

1. Whether, where the Ninth Circuit held that the compelling governmental interest in preventing diversion of funds raised for church projects outweighed the interference with Petitioner's free exercise rights resulting from the compelled disclosure by employees of the Federal Communications Commission from a church-licensee of the records of the pledges and donations of Petitioner, the judgment of that court was obtained by fraud committed upon it by the Respondents, where the factual predicate for the court's finding of the existence of a compelling governmental interest, that there were "allegations of fraud" and "fraudulent practices alleged" against the Petitioner and that the Respondents had conducted "several interviews in which they received information to support the allegations", was in fact non-existent and fraudulently proffered by the Respondents.

2. Whether the above actions of the Respondents violated due process.

3. Whether the above actions of the Respondents violated Petitioner's rights guaranteed under the Religion Clauses.

4. Whether the Ninth Circuit erred in denying Petitioner's motion to vacate judgment without a hearing.

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*Petitioner brings this action as an individual. All parties in this action are named in the caption.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Petitioner, Reverend W. Eugene Scott, Ph.D., respectfully prays that a Writ of Certiorari issue to review the final order of the United States Court of Appeals for the Ninth Circuit entered on April 13, 1983, denying Petitioner's motion to vacate the judgment of said court entered on January 21, 1983 affirming the Summary Judgment of the United States District Court for the Central District of California.

Opinion Below.

The order of the Court of Appeals is unreported and is reproduced in Appendix (App.) A, p. 1. The opinion of the court delivered in connection with the underlying judgment is reported as 702 F.2d 1263 (1983) and is reproduced in App. B, pp. 2-23.

Jurisdiction.

The order of the Court of Appeals was entered on April 13, 1983. A timely petition for rehearing and a suggestion for rehearing *en banc* were denied June 20, 1983. App. C, p. 24. On September 16, 1983, Associate Justice William H. Rehnquist extended the time within which to file a petition for a writ of certiorari to and including October 3, 1983. (App. D, p. 25). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Provisions Involved.

United States Constitution, Amendments I and V, and Title 28 United States Code, Federal Rules of Civil Procedure, Rule 60, which are printed in full in Appendix E, pp. 26-27.

Statement of the Case.

Petitioner is the duly-elected pastor of Faith Center, a 36-year-old church of congregational polity with its main sanctuary in Glendale, California. Petitioner is world-renowned for his tireless efforts to preserve unfeigned respect for both his God and his country, not only through his penetrating, challenging, and authoritative preaching of Scripture, but also by securing the separation of church and state, and thus, the dignity of both.

Toward these ends, Faith Center, fountainhead of Petitioner's television ministry and *the* pioneer in Christian television programming, owns the broadcasting licenses for KHOF-TV, Channel 30, San Bernardino, California, KVOF-TV, Channel 38, San Francisco, California, KHOF-FM, 99.5 FM, Los Angeles, California, and WHCT-TV, Channel 18, Hartford, Connecticut. Petitioner also broadcasts over an ever-expanding satellite network, from Seattle to Miami and from Washington, D.C. to Los Angeles.

But it was not always so. The Faith Center of today stands in marked contrast to the Faith Center of 1975 whose only salvation appeared to lie in declaring bankruptcy. $4,000,000 dollars in debt with $19,000 cash, Faith Center, by the unanimous vote of its congregation and its board of directors, turned to Petitioner, whose role as financial consultant to churches across the globe rendered him uniquely qualified for the Herculean task of reconstruction that lay ahead. Selfless managerial effort plus the rallying of the supporting audience through the unparalleled preaching of God's Word resulted in the revitalizing of a viable ministry outreach.

Ironically, as will hereafter be shown, it was the very uncompromising nature of Petitioner in preserving the separation of church and state, and in particular, preventing unwarranted encroachment of the government into church financial affairs,[1] that was to expose Petitioner and the church he pastored to the retaliatory misdeeds of ex-employees fired for the self-dealing and mismanagement which were the causes of Faith Center's near financial ruin. For alleged complaints, subsequently proven to be non-existent, from two of these ex-employees, who were very familiar with Petitioner's resistance to unjustified government invasions of church affairs, were to be the purported grounds for Respondents' desires to forage through church records.

In September of 1977, acting allegedly on a complaint received from one Paul Diederich, a former cameraman for

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[1]Petitioner successfully defended Faith Center in attempts by Los Angeles County to tax constitutionally tax-exempt properties of the church, won NLRB reversal of lower administrative rulings that church employees could be unionized, and secured the recognition of the California legislature through the enactment of the Petris Bill that the Attorney-General, then participating in the very investigation subsequently assumed by the FCC and the subject of the instant litigation, had no business inquiring into the administration of church funds absent criminal probable cause, thus terminating the Attorney-General's investigation.

the church who was terminated for falsifying time cards, Respondents, all of whom are present or former employees and officers of the Federal Communications Commission (hereafter, FCC), commenced an investigation of Faith Center. Respondents demanded access to all the church's financial records. The church responded in part to the demands of Respondents, but neither the board nor the congregation could in good conscience comply with the demand for those records which would reveal the identity of its donors, including that of Petitioner, in connection with the amounts given to the church and its pastor. The basis for this refusal was grounded and clearly stated in the Christian beliefs of Petitioner and the denomination to which the church belongs. Members of that denomination, the Full Gospel Fellowship of Churches and Ministers, International headquartered in Dallas, Texas and composed of over 2,000 member churches and 2 million adherents, are strictly commanded to give in secret. This is based upon Matthew 6:1-4 which states:

> "Take heed that ye do not your alms before men, to be seen of men: otherwise ye have no reward of your Father which is in heaven. Therefore, when thou doest thine alms, do not sound a trumpet before thee, as the hypocrites do in the synagogues and in the streets, that they may have glory of men. Verily I say unto you, They have their reward. But when thou doest alms, let not thy left hand know what thy right hand doeth: That thine alms may be in secret: and thy Father which seeth in secret himself shall reward thee openly."

Any coerced disclosure of donations therefore directly violates a central tenet of Petitioner's religious beliefs. Respondents were advised that their demands infringed upon Petitioner's religious freedom, yet continued their demands. In August of 1978, Petitioner, finding no other recourse to

protect himself against the intrusion of Respondents, brought the underlying action for injunctive relief and for actual punitive damages against the Respondents herein, jurisdiction for which existed based upon, *inter alia*, the First Amendment.

The Ninth Circuit, in affirming the district court's granting of summary judgment against the Petitioner, held that a compelling governmental interest in preventing diversion of funds raised for certain church projects justified the interference with Petitioner's free exercise rights resulting from the FCC's demands for the donation records of Petitioner. App. B, p. 20. The factual predicate for the Ninth Circuit's finding of the existence of a compelling governmental interest was the Respondent's assertions that there had been "allegations [plural] of fraud", "fraudulent practices [plural] alleged", and that in addition to and apart from Diederich's alleged complaint, the Respondents had conducted "several interviews" in which they received information to support Diederich's allegations. Herein lies the fraud.

The nature of Respondents' fraud is two-fold. The first component of Respondents' fraud was their representations that prior to their September 19, 1977 demands for donor records, there had been allegations of fraud, from numerous complaints received by them, or from numerous complainants or sources. The second was simply their representations that there were allegations of *fraud* or *fraudulent* practices all prior to, and justifying, their September 19 demands for donor records. Both were exposed in Petitioner's motion to vacate judgment for fraud.[2]

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[2] "Motion to Vacate Judgment pursuant to F.R.C.P. 60(b)(3), 60(b)(6), and for Fruad Upon the Court; Declarations of Kenneth E. Roberson and Edward L. Masry in Support thereof; Memorandum of Points and Authorities in Support thereof", filed March 8, 1983 (hereafter, Motion).

The Ninth Circuit was not the only victim of the first fraud. Motion, at 19-20. This very Court was defrauded by similar representations by the FCC in the case of *Faith Center, Inc., Petitioner, v. Federal Communications Commission, Respondent,* No. 82-867, October Term, 1982. Therein the FCC stated in its January 1983 "Brief for the Respondent in Opposition" that

> In 1977 the Federal Communications Commission received *complaints* [plural]. . . . The Commission *thereafter* instituted an informal investigation into Faith's operations . . . at 2 (emphasis added),

and

> The *complaints* [plural] contained allegations. . . . *Id.*, fn. 2 (emphasis added).

Earlier, in *Faith Center, Inc., Appellant v. Federal Communications Commission, Appellee,* Nos. 81-1648 and 81-1649, the D.C. Circuit was similarly defrauded. For the FCC, in its December 1981 "Brief for Federal Communications Commission", stated that

> . . . [There were] *charges* that the licensee had fraudulently solicited . . . at 1 (emphasis added),

that

> . . . [There were] *charges* that a broadcast station licensed to a religious organization had been used for the purpose of fraudulently soliciting funds from the public." at 2 (emphasis added),

and, significantly, that

> In 1977, the FCC instituted an information investigation into Faith's operation of KHOF-TV *after* the agency received a *number of complaints*. . . ." at 4 (emphasis added).

Indeed, in its nationwide "News" fact sheet released April 21, 1982, the FCC falsely stated that

> The FCC began an investigation into Faith Center's operation of KHOF-TV (Channel 30), San Bernardino, California, *after* receiving *complaints* [regarding solicitations] and that the solicitations included false statements. (emphasis added).

The Respondents represented the above to the Ninth Circuit also. As earlier stated, the Ninth Circuit found that there had been "allegations [plural] of fraud", "fraudulent practices [plural] alleged", and that, in addition to Diederich's alleged complaint

> *before* [the Respondents] sought to inspect church records [the Respondents] conducted *several interviews* in which they received information to support Diederich's allegations. App. B, pp. 15, 17-21 (emphasis added); Motion, at 21.

The Ninth Circuit relied, *inter alia*, upon the representations of Respondent Rosenberg. In his "Affidavit", Exhibit "A" to the Respondents' "Motion to Dismiss, or in the Alternative for Summary Judgment"[3] Respondent Rosenberg stated, under penalty of perjury, that the sequence of events was: (1) the Commission received Diederich's complaint and interviewed him (p. 2, ¶3); (2) subsequently, Rosenberg and another FCC employee "conducted a number of interviews" in which they received further "allegations" (*Id.*, ¶4); and (3) only *after* the above did they arrive at Faith Center and demand church records (*Id.*, ¶15).

Nor was the Ninth Circuit the only victim of the second fraud, namely, that there were allegations of fraud or fraudulent practices. Motion, at 19-20. The above quotations evidencing the Respondents' misrepresentations with re-

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[3]See, "Affidavit" of Joel Rosenberg, March 24, 1979, pp. 2-3; Appellant's "Excerpt of Record" at 49-50.

spect to the number of complaints also evidence that the Respondents claimed that those complaints were of fraud. Further, before the Ninth Circuit, the Respondents, in their "Brief for Appellees", declared that Diederich alleged by his letter that the licensee "had committed false and fraudulent practices" (at 3). Thus, the Ninth Circuit relied upon Respondents in concluding that there were "allegations of fraud", "fraudulent practices alleged", and "several interviews" supporting the allegations of "fraud".

The motion to vacate judgment for fraud upon the Ninth Circuit indisputably showed (1) that the FCC Respondents had received, not "numerous complaints" but a *single* complaint from Diederich, and (2) that that complaint did not allege fraud. The Petitioner's motion further proved that (3) no other complainants existed prior to September 19, (4) that the Respondents did *not* conduct "several interviews" prior to their demands for church records but only *one* and that of Diederich, (5) that *after* their September 19 demands they did not receive further complaints nor conduct "several interviews," but instead *solicited* statements from but a single interviewee whom *they* sought out, and (5) that that interviewee, Joseph Baumgartner, fired from Faith Center for embezzlement, *denied* under oath that he ever accused Petitioner or Faith Center of fraud. Motion, at 22-26.

Specifically, despite substantial resistance, the Respondents were forced to reveal the sources for their statements that there were numerous allegations, etc., made against Petitioner. In their "Broadcast Bureau's Response to Motion to Compel Answers", dated March 23, 1979 in FCC hearing proceedings involving the church's KHGF-TV license, *the FCC's sole sources were quoted as being*

> . . . statement of Joseph Baumgartner dated September 20, 1977 (...) Letter of Paul Diederich dated August 8, 1977; statement of Diederich dated September 15,

1977. Motion, at 22-23.

With the benefit of the above, then it is clear that *prior* to the September 19 investigation, there was but *one* complaint from but *one* complainant, the August 8, 1977 letter from Diederich. The later September 15 statement of Diederich was a follow-up statement taken by the Respondents after this complaint. Moreover, the later September 20 statement was not a complaint, but a statement solicited by Respondents, and again, it was solicited after the demand for donor records. Motion, at 23. These facts flatly contradicted the earlier position of Respondents that there were, prior to the demands of the FCC for Petitioner's records, "numerous allegations", "numerous complaints", "charges" or "several interviews".

Diederich's letter did not allege fraud. For example, in the instant case U.S. Magistrate Ralph J. Geffen, after having specifically reviewed that letter, explicitly declared that it did not allege either fraud or fraudulent practices as having occurred. Motion, at 24. In fact, a cursory reading of the letter revealed that "fraud" or "fraudulent practices" were *nowhere to be found*. Motion, Exhibit "B".

Moreover, Diederich had himself under oath testified that (1) although certain specific projects had not been completed prior to his firing in January of 1977, he had no knowledge as to whether Faith Center subsequently completed them,[4] (2) he had no knowledge or reason to believe that Dr. Scott had misused Faith Center's broadcast license for monetary

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[4] "Reply to Opposition to Motion to Vacate Judgment," filed March 22, 1983 (hereafter, Reply), at 13. In substance, Petitioner proved without challenge from Diederich's deposition that the reason he stated that the "projects" were never undertaken though funds were raised was that he had been fired *after* the monies were received but *before* he could have seen them expended.

or personal gain,[5] and (3) he had no information, knowledge, or belief that Faith Center had defrauded its listening audience.[6] And, Diederich further testified that he did not believe, *or allege in his August 1977 letter,* that fraud had occurred, and testified that after having worked for over a year with Dr. Scott, he had never seen him do a dishonest act. Motion, Exhibit "D". Finally, Diederich himself cross-complained against the Respondents for their misrepresenting him as accusing Petitioner or his church of fraud, and filed an amicus brief before this Court in support of Faith Center's attempt to obtain its license back after its fraudulent dismissal.[7] Motion, at 26; Reply, at 11-12.

Turning to Mr. Baumgartner's statement of September 20, for reasons above stated it could not have been relied upon as having occurred prior to the Respondents' demands for donor records, or during one of the (non-existent) "several interviews" conducted prior to the Respondents' demands. Petitioner's motion demonstrated (as did the Respondents' silence on this point) that Baumgartner denied

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[5]*Faith Center, Inc. v. Federal Communications Commission,* Nos. 81-1648 and 81-1649, D.C. Circuit, *supra,* Transcript of Paul Diederich, October 10, 1979, at 86-87, 96-97; 9 Joint Appendix 2150-2151, 2160-2161.

[6]*Id.*, Jt. App. 2160.

[7]In an amazing example of the perfidy of blatant fabrications by the Respondents that have polluted these proceedings, the Respondents, through Assistant U.S. Attorney Peter Osinoff, stated that counsel for Petitioner herein and other counsel for Faith Center had engaged in collusion with Diederich. The Respondents proffered as evidence their charge that Diederich "neither answered nor moved to dismiss" the complaint served upon him by Petitioner, and the charge that counsel for Petitioner herein had represented Diederich in his amicus brief before this Court. When, however, Petitioner supplied a conformed copy of Mr. Diederich's answer (on file in the very same building in which the Assistant U.S. Attorney worked) and an affidavit from Parker and Son, Ltd., printers of Mr. Diederich's amicus brief, that the placing of the name of counsel herein on Diederich's amicus brief had been their printing error, even sheepish apologies were not forthcoming. Reply, at 11-12.

ever having accused Petitioner of fraud.[8]

Faced with the above, namely, that there were not numerous individuals who complained of fraud, the Respondents (1) admitted that "fraud" and/or "fraudulent practices" were *nowhere* to be found in Diederich's letter,[9] (2) conceded that it was *they* who had "characterized" Diederich's statements as charging fraud, Opposition, at 5, and then, unable to refute Petitioner's proof that there were not numerous complainants or several interviews, (3) shamefully attempted to argue that the numerous allegations were all to be found in the single letter of Diederich. *Id.*[10]

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[8]Despite FCC resistance, the deposition of Joseph Baumgartner was ultimately taken. See "Transcript of Deposition of Joseph Baumgartner, October 10, 1979" on file in *Faith Center, Inc.*, D.C. Circuit, *supra*. Mr. Baumgartner made it absolutely clear in said deposition that the FCC investigators had *sought* him out to obtain a statement (Trans., pp. 7, 8, 12; 9 Joint Appendix 2178, 2179, 2183), that he had not told Commission investigators that monies collected for specific purposes had not been expended in the manner specified (Trans., p. 7; 98 Jt. App. 2178), that while most of the funds had not been used prior to his termination, he had been unable to tell the investigators whether or how the funds had been used in intervening months (Trans., pp. 8, 12-16; 9 Jt. App. 2179, 2183-2187), and that he knew of no actions taken by the church or Petitioner with the intention of defrauding its listeners (Trans., p. 117; 9 Jt. App. 2287).

[9]"Opposition to Motion to Vacate Judgment", filed March 14, 1983 (hereafter, Opposition), at 5.

[10]During discovery in a related case those Respondents who were deposed were capriciously instructed by FCC Chairman Mark S. Fowler to limit their answers to specified areas despite the liberal range of inquiry under federal discovery procedure, and he imposed totally irrelevant *FCC* rules and discovery procedure upon these *federal court* proceedings. Each of the Respondents were then instructed not to answer virtually every question posed to them, to hide the wrongdoing only partially described herein.

REASONS FOR GRANTING THE WRIT.

I.
Introduction.

The present case involves more than simply an attempt to redress the grievous assault by members of an administrative agency upon the religious freedoms of a donor giving in secret according to religious conviction. The grief of Petitioner is understood only by recitation of the following.

The role of the federal government in securing the long overdue enjoyment by minorities of their federal civil rights stands in stark and ironic contrast to the treatment afforded to date by much of the same governmet in vindicating Petitioner's religious freedoms. For, by way of oversimplification, said government transcended anti-black animus which created barriers among men to the securing of those unalienable liberties with which they as equals were endowed by their Creator, the federal government willing to respond to the cries of leading churchmen in the ordering of state/individual relationships. Yet, the same federal government has yet been unwilling to acknowledge a far more malignant cancer creating a barrier between God and man in the exercise of that paramount liberty to worship his Creator, when those same cries would affect the ordering of federal/individual relationships.

The cancer that cries for cure is the modern disrespect for the church and churchmen, a symptom of which is the nearly irrebuttable presumption of immorality that attaches to either when accused, however spuriously or spitefully, of wrongdoing. Whether Hollywood's Elmer Gantry is a cause or symptom of this presumptive bias, holding all the church world accountable for bad eggs like a Communist Jim Jones that exist in any field of endeavor is akin only to making Jesus responsible for Judas's choice, or, for that

matter, holding all federal employees morally responsible for Watergate. And, ironically, as is the nature of those harboring the most deep-seated biases, those the quickest to claim immunity are those likely to be affected the most.

It follows, then, that when some government officials (who often have greater ease accepting a view of preachers and churchmen as meek and bespectacled instead of like the Christ who, if he did today what he did centuries ago in the temple, would be arrested for assault with a deadly weapon) encounter Constitution-respecting churchmen fearlessly asserting constitutional rights that by their nature are assertable only in conflicts with government, said bias will often result in the imputation to the claimant of ulterior motives and a counting of his civil rights as something to be circumvented. Nowhere has the snide assurance that this malignancy will go unchecked found better expression than in the Respondents fraudulently proffering to the Ninth Circuit that there were numerous allegations of fraud supporting their investigation demands.

This case is not simply one seeking reversal of a decision involving egregious factual error. It seeks a remedy to the active fraud perpetrated by federal administrative officials. Thus, this case is extremely important, as it involves the question of whether federal administrative officials may go so far as to effect the violation of Petitioner's rights by perpetrating a fraud upon a court over which this Honorable Court has supervisory power. Additionally, important issues are whether the actions of the Respondents violated due process and/or Petitioner's freedoms under the Religion clauses, and whether the Ninth Circuit further violated due process by denying Petitioner's motion before it without a hearing.

II.

The Respondents Committed Fraud Upon the Court and Violated the Petitioner's Due Process Rights.

The fact that federal courts possess inherent power to review judgments obtained by fraud is settled. *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238 (1944); *Universal Oil Products Co. v. Root Refining Co.*, 327 U.S. 575 (1946), *remand* 169 F.2d 514 (3rd Cir., 1948) *cert. den'd., sub nom. Universal Oil Products Co. v. William Whitman Co.*, 335 U.S. 912 (1949). In fact, in *Hazel*, this Court vacated a *fourteen*-year-old judgment rendered by the Third Circuit pursuant to the inherent power of that court to review fraud. And, significantly, there is no limitation period within which courts must review fraud.

Under Federal Rule of Civil Procedure 60(b) (see App. E) upon motion a court may relieve a party from a judgment for fraud, misrepresentation, or other misconduct of an adverse party, 60(b)(3), and for any other reason justifying reelief, 60(b)(6). And, under *Yanow v. Weyerhauser SS Co.*, 274 F.2d 274, 277-278 (9th Cir., 1959), *cert den'd.*, 362 U.S. 919, the Ninth Circuit held that F.R.Civ.P. 60(b) was applicable to proceedings in that court as that rule had been incorporated into its local rules, since under its local rule 8, subdivision 1, 28 U.S.C.A., the Federal Rules of Civil Procedure had been adopted as part of the rules of the court.[11]

Moreover, where government conduct in federal court is fundamentally unfair, due process applies to correct the injustice.[12] Here, commission by the Respondents of the above-recited fraud has prejudiced both Petitioner and the

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[11]Then local rule 8 is now local rule 5.

[12]*E.g., Alcorta v. Texas*, 355 U.S. 28 (1957) (knowing use of false testimony by government prosecutor).

effective administration of justice in the courts itself.

It is clear from the earlier recited facts that a fraud was committed upon the Ninth Circuit. The facts are (1) prior to the Respondents' demands for Petitioner's donor records, there was but a *single* complaint letter, not numerous "allegations", (2) both U.S. Magistrate Geffen and the so-called complainant denied that the complaint complained of fraud, (3) the Respondents admit that it was they who later characterized Diederich's complaint as one of fraud, and (4) that "fraud" and/or "fraudulent practices" were *nowhere* to be found in his letter. Further, it remains undenied that, contrary to the Respondent's position that there were "several interviews" prior to their demands for donor records, their own records reveal but one: that of Diederich.

III.

The Respondents' Fraud Violated Petitioner's Free Exercise Rights.

The government may restrict religiously motivated action only if a "compelling state interest" is served. *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). ". . . [O]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitations . . ." *Id.* The government must also show that no alternative means exists that would achieve its end without infringing First Amendment rights. *Id.* at 407.

It is of course clear that the Ninth Circuit conceded that Petitioner's free exercise rights were interfered with, App. B, p. 17, necessitating the existence of a compelling governmental interest, App. B, p. 20, which the court found in the prevention of crime.[13] Inasmuch as the factual pred-

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[13]Of course the reality is that the FCC has no jurisdiction to prosecute crime, which is a function of the Justice Department. And the court assumed without analysis that the interest of an administrative agency in investigating licensee activities was equivalent to that of prosecutors investigating crime.

icate for the court's finding of a compelling government interest was utterly non-existent, Petitioner's free exercise rights were in fact violated.

IV.

Denial of Petitioner's Motion Without Even a Hearing Violated Procedural Due Process.

Procedural safeguards of notice and a hearing are required as the precondition to government action having more than a "de minimis" impact on individual rights. *Goss v. Lopez*, 419 U.S. 565 (1975). If in *Goss*, the 10-day suspension of a student from school was not *de minimis*, surely proven violations of Petitioner's free exercise and due process rights and proof of fraud upon the court warrant at least a hearing before the Ninth Circuit. This Court has often recognized that "the more important the rights at stake, the more important must be the procedural safeguards surrounding those rights." *Speiser v. Randall*, 357 U.S. 513, 520-21 (1958). Thus a hearing before the Ninth Circuit, or at least remand to the District Court for such an evidentiary hearing and/or opportunity to argue the matter, should have been permitted.

Conclusion.

For each of the above reasons, including the power of this Honorable Court to *supervise* the administration of appellate justice, Supreme Court Rule 17(a), a writ of certiorari should issue to review the order of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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Reverend W. Eugene Scott, Ph.D.

APPENDIX A.

Order.

EXHIBIT A.

United States Court of Appeals for the Ninth Circuit.

Reverend M. Eugene Scott, PhD., Plaintiff-Appellant, vs. Joel Rosenberg, et al., Defendants-Appellees. No. 81-5387. D.C. No. CV 78-3132 AAH.

Filed: April 13, 1983.

Appeal from the United States District Court for the Central District of California.

Before: WALLACE, SCHROEDER and CANBY, Circuit Judges

Appellant's Motion to Vacate Judgment and Motion for Stay are denied.

APPENDIX B.

Opinion.

United States Court of Appeals for the Ninth Circuit.

Reverend M. Eugene Scott, PhD., Plaintiff-Appellant, vs. Joel Rosenberg, et al., Defendants-Appellees. No. 81-5387. D.C. No. CV 78-3132 AAH.

Filed: January 21, 1983.

Appeal from the United States District Court for the Central District of California.

Andrew A. Hauk, District Judge, Presiding. Argued and Submitted March 3, 1982.

BEFORE: WALLACE, SCHROEDER, and CANBY, Circuit Judges.

WALLACE, Circuit Judge:

Scott, the president and pastor of Faith Center Church (the church), brought this action for injunctive relief and for actual and punitive damages against five present and former officers and employees (the government employees) of the Federal Communications Commission (the FCC), alleging that they violated his first amendment rights during an investigation of the church's television and radio stations. The district court granted summary judgment for the government employees. We affirm.

I

Diederich, a former employee of one of the church's television stations, sent a letter to the FCC in which he alleged that Scott had solicited during broadcasts and subsequently received funds for projects which were never undertaken. He also stated his belief that Scott was using the stations for his personal gain. In response to that letter, the FCC instituted an investigation of the church's California television and radio stations. The FCC conducted a number

of interviews during which further allegations were made: that the stations had failed to log paid religious programming as commercial broadcasting, that Scott had misstated the amount of his personal remuneration during broadcast solicitations, and that Scott had made personal pledges during the broadcasts which he had never fulfilled.

Subsequently, two FCC employees made an unannounced visit to the television station located in the main church building to interview employees and investigate records. There is some dispute with respect to how clearly they identified the purpose of their visit and with respect to the scope of their request for access to church and station records. In any event, the church subsequently made available some, but not all, of the materials requested, and thereafter the FCC issued an order designating for hearing the station's application for license renewal and a notice of apparent liability for forfeiture for violation of 18 U.S.C. § 1343, the statute governing fraud by use of radio and television. The record does not indicate the status of the proceedings pertaining to that order. The church has apparently sought relief both before the FCC and in the courts. Those claims of the church, however, are not before us. Scott brought this action not in any representative capacity, but to vindicate his individual rights. He apparently does not, in his personal capacity, contest the FCC's request for station logs and for his salary records. He does, however, allege that the FCC's inquiry into his personal donations violates his free exercise rights under the first amendment.[1] Scott's claim that his religion requires donations to be made confidentially if they are to be received by God as sacrifices is not disputed.

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[1]Scott also claimed a deprivation of his fourth, fifth and ninth amendment rights, but cited no supporting authority. We find these claims frivolous.

The questions presented by this appeal are whether Scott has standing to bring this action; whether Scott has a legal basis for his claim under 42 U.S.C. § 1983, under 42 U.S.C. § 1985(3) or directly under the first amendment; whether the FCC employees violated Scott's first amendment rights; and, if so, whether the FCC employees are entitled to immunity. Summary judgment was appropriate because there is no genuine issue as to any material fact.

II

The government employees argue that Scott lacks standing to bring this action because the FCC investigation was directed towards the station and not Scott, and because the FCC requested only church records and none of Scott's personal records. We hold, however, that Scott has standing to assert his claim.

Article III of the Constitution limits the judicial power of the United States to the resolution of actual cases and controversies. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, ___ U.S. ___, ___, 102 S. Ct. 752, 757 (1982) (*Valley Forge*). A part of this article III requirement is the doctrine of standing. *Id.* at ___, 102 S. Ct. at 758. The "gist of the question of standing" is whether the plaintiff has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962). At a minimum,

> Article III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99, 99 S. Ct. 1601, 1608, 60 L. Ed. 2d 66 (1979), and that the injury

> "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision," *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41, 96 S. Ct. 1917, 1924, 1925, 48 L. Ed. 2d 450 (1976).

Valley Forge, supra, ___ U.S. at ___, 102 S. Ct. at 758 (footnote omitted); *see Larson v. Valente*, 456 U.S. 228, ___, 102 S. Ct. 1673, 1680-83 (1982) (church, as well as its individual followers, had standing under article III to challenge state law requiring religious organizations that received more than half their total contributions from non-members to register and report to the state).

But even meeting this article III threshold for standing may be insufficient to gain access to the federal court for redress of certain claims. The Court has also articulated several prudential requirements which limit the category of persons who may invoke the powers of the federal judiciary. When the plaintiff's "asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction." *Warth v. Seldin*, 422 U.S. 490, 499 (1975); *accord Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 216-27 (1974). In addition, the "Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin, supra*, 422 U.S. at 499; *Tileston v. Ullman*, 318 U.S. 44 (1943) (per curiam).[2] Under these prudential

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[2]There are certain other prudential limitations on standing which are applied in appropriate circumstances. *See, e.g., Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 39 n.19 (1976) (the interest of the plaintiff must at least be "'arguably within the zone of interests to be protected or regulated' by the statutory framework within which his claim arises," *quoting Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)).

principles, the judiciary seeks "to limit access to the federal courts to those litigants best suited to assert . . . particular claim[s]" and "to avoid deciding questions of broad social import where no individual rights would be vindicated." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 9-100 (1979).

We conclude that Scott meets the constitutional requirement for standing. The FCC requested church records of Scott's donations. Scott alleges that his religious beliefs require that his giving be secret if it is to be efficacious. The government employees do not deny that this is a tenet of Scott's faith. Scott, therefore, may properly allege injury from disclosure of his donations. If the FCC has already procured the requested records, the alleged injury may be actual. If the FCC has not yet received the documents, but continues to threaten the church with a loss of its license for failure to produce them, the alleged injury is at least threatened. Therefore, the injury aspect of article III standing is met.

The second constitutional standing requirement is that the injury be traceable to the government employees' action. Here, it is. The church has not and apparently will not release the records voluntarily. But for the FCC's actions, no injury or threat of injury could have occurred. The government employees argue that if they have interfered with any first amendment rights, they are the rights of the church, for no request has been made of Scott personally. Superficially, the argument is plausible, but the law is otherwise. When a governmental demand "imposed on one part causes specific harm to a third party, harm that a constitutional provision or statute was intended to prevent, the indirectness of the injury does not . . . deprive the person harmed of standing to vindicate his rights" if he can establish that "the asserted injury was the consequence of the defendants' ac-

tions, or that prospective relief will remove the harm." *Warth v. Seldin, supra*, 422 U.S. at 505; *see United States v. SCRAP*, 412 U.S. 669 (1973); *Roe v. Wade*, 410 U.S. 113, 124 (1973).

The final requirement for article III standing is that a favorable decision would prevent or redress the injury. Scott alleges and we assume, *see* Part V, *infra*, that he may be entitled to damages if he has suffered a violation of his first amendment rights. Furthermore, if the action of the government employees threatens future violation of his first amendment rights, he is entitled to injunctive relief prohibiting their demands on the church for his donation records. A favorable decision would prevent or redress Scott's injury.

Scott therefore meets the constitutional requirements for standing. We turn now to the prudential requirements. His asserted harm is a particularized grievance, namely, the threatened or actual dissemination of his personal donation records, and he asserts his own legal rights and interests under the Constitution, not those of the church or of any third person. *See generally United States v. Raines*, 362 U.S. 17, 21-22 (1960); *Barrows v. Jackson*, 346 U.S. 249, 256-57 (1953); *Tileston v. Ullman, supra*, 318 U.S. at 46. The mere fact that the records which have been or may be taken are church records does not mean that the intrusion could violate only the church's rights. *See NAACP v. Alabama*, 357 U.S. 449, 458-59 (1958). Thus, Scott has standing in this case. We therefore turn to the merits of his claims.

III

Shortly after the FCC initiated its investigation, the Attorney General of the State of California began an investigation of similar allegations pursuant to then-effective California law. Scott alleges that the government employees

engaged in a series of telephone conversations and written communications with California officials, and thus participated in the state inquiry, including the state subpoena of church records, in violation of 42 U.S.C. § 1983. We assume for purposes of this appeal that federal employees, like private citizens, can act "under color of state law" and may be liable under section 1983 if they conspire with or participate in concert with state officials who, under color of state law, act to deprive a person of protected rights. *See Dombrowski v. Eastland*, 387 U.S. 82, 84 (1967) (per curiam); *Kletschka v. Driver*, 411 F.2d 436, 448-49 (2d Cir. 1969); *Peck v. United States*, 470 F. Supp. 1003, 1007 (S.D.N.Y. 1979).

Nevertheless, even when properly viewed in the light most favorable to Scott, the materials submitted in support of and in opposition to the motion for summary judgment present no genuine issue of material fact which can assist him. At most, the government employees requested information from, offered to exchange, and did exchange information with the California attorney general's office by means of which the two agencies assisted one another. The government employees denied by affidavit that they either instigated the state investigation or requested that state investigators procure information for them. Scott produced no evidence to the contrary. Therefore, Scott has raised no genuine issue of material fact which might support his claim for relief under section 1983. *See Angel v. Seattle-First National Bank*, 653 F.2d 1293, 1299 (9th Cir. 1981); *Marks v. United States*, 578 F.2d 261, 262-63 (9th Cir. 1978).

The state investigation, including the state subpoena of church records, is the only state action alleged in the complaint. We conclude that the FCC officers were not "willful participant[s] in joint activity with the State or its agents," *United States v. Price*, 383 U.S. 787, 794 (1966) (constru-

ing 18 U.S.C. § 242), simply because they may have furnished some information which facilitated the state investigation. Any FCC request for and receipt of information gathered by the state officials in the course o. their independent investigation did not constitute action under color of state law. It is true that "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." *Monroe v. Pape*, 365 U.S. 167, 184 (1961) (*quoting United States v. Classic*, 313 U.S. 299, 326 (1941)), *overruled on other grounds, Monell v. Department of Social Services*, 436 U.S. 658 (1978). But even if we assume that the state officials violated Scott's first amendment rights in the course of their investigation, the mere fact that they may have shared with the government employees information unlawfully procured does not mean that the government employees acted under color of state law. If the government employees requested information from the state in this case, they acted under power possessed by virtue of *federal* law. If they obtained that information, it was because they were clothed with the authority of *federal* law. This, without more, is not enough to establish that their conduct was under color of state law. *See District of Columbia v. Carter*, 409 U.S. 418, 424-25 (1973).

IV

Scott also alleges that the government employees conspired with the California officials and with the church's ex-employees to deprive him of equal protection of the laws in violation of 42 U.S.C. § 1985(3). It may well be that a claim based upon a conspiracy to violate a protected right of religion could be stated pursuant to section 1985(3). *See Life Insurance Company of North America v. Reichardt*,

591 F.2d 499, 505 & n.15 (9th Cir. 1979). In this case, however, Scott has stated no claim for relief under the statute.

In *Griffin v. Breckenridge*, 403 U.S. 88 (1971), the Supreme Court held that section 1985(3) was not "intended to apply to all tortious, conspiratorial interferences with the rights of others." *Id.* at 101. Rather,

> [t]he language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all.

Id. at 102 (footnotes omitted, emphasis in original). Scott has alleged no class-based, invidiously discriminatory animus for the alleged conspiracy. He has not alleged that the government employees deprived him of his first amendment rights because of his church membership or because he is one of a group holding certain religious beliefs or that the FCC action was in any other way class-based. He has failed to allege any facts from which we might infer a class-based animus. We therefore conclude that he has failed to state a claim for relief under the statute. *See Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980); *Life Insurance Company of North America v. Reichardt, supra*, 591 F.2d at 505; *Prochaska v. Fediaczko*, 473 F. Supp. 704, 709 (W.D. Pa. 1979) (conspiracy directed only toward the individual exercise of first amendment rights does not state a cause of action under section 1985(3)).

V

We must next decide whether Scott has a claim under the first amendment and, if so, what type of remedy is appropriate. We learned from the Supreme Court in *Bivens v. Six*

Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) (*Bivens*), that a person whose fourth amendment rights have been violated by federal officers has a legal claim implied directly under the fourth amendment and is entitled to recover money damages for his injuries. The same right was extended to a claim arising from a violation of the fifth amendment in *Davis v. Passman*, 442 U.S. 228 (1979), and to a claim arising from a violation of the eighth amendment in *Carlson v. Green*, 446 U.S. 14 (1980). The question before us is whether, as with the fourth, fifth, and eighth amendments, a claim also arises under the Constitution for violations of first amendment rights by federal officials.

Ordinarily, a right of action for damages against government officials is given birth by statutory mandate. *See Bivens, supra*, 403 U.S. at 427-30 (Black, J., dissenting). The right of action judicially created in *Bivens* must accordingly be treated as an exception. That exception, however, is not limited to the fourth amendment. *See Davis v. Passman, supra*, 442 U.S. at 248. Indeed, the Court has expanded it to a principle of constitutional liability in very broad language:

> At least in the absence of "a textually demonstrable constitutional commitment of [an] issue to a coordinate political department," *Baker v. Carr*, 369 U.S. 186, 217 (1962), we presume that justiciable constitutional rights are to be enforced through the courts. And, unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights.

Id. at 242.

While this analysis assists us with the disposition of this appeal, it is not necessary, as will soon be clear, for us to decide the ultimate issue of whether the first amendment provides a right of action. It is clear, however, that if first amendment rights are justiciable, then Scott is among "the class of litigants who allege that their own constitutional rights have been violated." *Id.* There has been no suggestion by the government employees that Scott is not among those "who at the same time have no effective means other than the judiciary to enforce these rights." *Id.* We assume, without deciding, that a private cause of action may be implied directly under the Constitution for violations of the first amendment. *See Trapnell v. Riggsby*, 622 F.2d 290, 294 (7th Cir. 1980); *Dellums v. Powell*, 566 F.2d 167, 194-95 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978); *Paton v. La Prade*, 524 F.2d 862, 869-70 (3d Cir. 1975).

Our next question is whether damages is an appropriate form of relief. In *Davis v. Passman*, the Court stated that "*Bivens* . . . holds that in appropriate circumstances a federal district court may provide relief in damages for the violation of constitutional rights if there are 'no special factors counselling hesitation in the absence of affirmative action by Congress.' " 442 U.S. at 245; *see Butz v. Economou*, 438 U.S. 478, 503-04 (1978). Holding that relief in damages was appropriate for violations of the due process clause of the fifth amendment, the Court identified the following policy factors as pertinent areas of inquiry: whether damages have been regarded historically as the ordinary remedy for the injury alleged, whether relief in damages would be judicially manageable, whether there are available alternative forms of judicial relief, whether evidence suggests that a damages remedy is contrary to the will of Congress, and whether such a remedy would open the courts to

a deluge of claims. 442 U.S. at 245-48.

Once more, however, it is unnecessary for us to decide whether these factors favor a damages remedy for violations of the free exercise clause by federal officials. We assume without holding that Scott is entitled to recover damages if his first amendment rights have been unjustifiably violated, *see Trapnell v. Riggsby, supra,* 622 F.2d at 294; *Dellums v. Powell, supra,* 566 F.2d at 194-95; *Paton v. La Prade, supra,* 524 F.2d at 869-70, and may be entitled to injunctive relief from a threat of a violation.

VI

We must next examine the record to determine if there is any genuine factual dispute whether the government employees violated Scott's first amendment rights. Scott alleges that the government employees informed the press and public that they were investigating charges of fraud against Scott. He claims that those statements interfered with the free exercise of his religious obligation to convert others to his beliefs. He also argues that the FCC's demand, in conjunction with its investigation, that the church provide records of his personal pledges during 1976 and 1977, together with information showing the status of those pledges (paid, withdrawn, or outstanding) violates the free exercise clause of the first amendment.

In support of their motions for summary judgment, the government employees submitted affidavits in which they stated that they did not provide any information to the press or public with respect to the specific allegations made against the church. They further testified that they made no statements to the press or public accusing Scott of any criminal or dishonest activity. Scott introduced letters prepared by two of the government employees in response to public and congressional inquiries concerning the investigation. Those

letters simply confirm that an investigation was in progress and that it was initiated in response to a complaint alleging irregular conduct. The letters further clarify the FCC's responsibility to investigate such complaints, including possible questions concerning the complainant's credibility. The letters do not, however, support Scott's allegations that the government employees dispatched charges of fraud to the press and public. Scott's allegations are unsupported by a factual presentation. Merely conclusory, they are insufficient to survive the government employees' motion for summary judgment. *Angel v. Seattle-First National Bank, supra,* 653 F.2d at 1299; *Marks v. United States, supra,* 578 F.2d at 262-63.

Scott's second argument about the investigation of his pledges presents more difficult questions. It is complicated by the fact that the church owns the broadcast station. Our analysis must be on two levels first, the result of the actions of the FCC in relation to the station and second, the result of its actions in relation to Scott.

We start with the proposition that first amendment analysis may be different for broadcasters than for members of other types of media. A greater degree of conflict with traditional first amendment principles is tolerated with the broadcast media because of the limited number of available frequencies. *FCC v. Pacifica Foundation,* 438 U.S. 726, 748 (1978) ("[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection."); *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 383, 386-89 (1969) (broadcast frequencies are a "public trust"; "differences in the characteristics of [the broadcast] media justify differences in the First Amendment standards applied to them."); *see Buckley v. Valeo,* 424 U.S. 1, 49 n. 55 (1976) (per curiam) (distinguishing broadcast media cases from traditional free speech cases); *Columbia*

Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 101 (1973) ("*Red Lion Broadcasting Co. v. FCC* makes clear that the broadcast media pose unique and special problems not present in the traditional free speech case.") (citation omitted); *cf. Red Lion Broadcasting Co. v. FCC, supra*, 395 U.S. at 375 (fairness doctrine "enhance[s] rather than abridge[s] the freedoms of speech and press protected by the First Amendment"). The first question, therefore, is should the FCC be required to meet a different standard prior to investigation of broadcasters of religious programs than it is required to meet prior to investigation of broadcasters of secular programs? More specifically, should the FCC be required to demonstrate a compelling governmental interest prior to investigating an allegation of fraud by one of its licensees that is owned by or affiliated with a religious organization? We hold that such a requirement is not necessary.

The Federal Communications Act authorizes the FCC to regulate as required by the "public convenience, interest, or necessity," 47 U.S.C. § 303, and does not differentiate types of broadcast licensees. The FCC grants licenses and regulates the public airwaves without differentiating between religious and secular broadcasters. *See, e.g., In re PTL of Heritage Village Church & Missionary Fellowship, Inc.*, 7 F.C.C.2d 324 (1979). In addition, courts have approved the application of FCC rules to religious groups on the same basis as applied to secular groups. *See Red Lion Broadcasting Co. v. FCC, supra* (fairness doctrine applied to broadcast of a religious program without distinguishing religious and secular broadcasting); *King's Garden, Inc. v. FCC*, 498 F.2d 51, 60 (D.C. Cir. 1974) ("But, like any other group, a religious sect takes its franchise 'burdened by enforceable public obligations.' "), *cert. denied*, 419 U.S. 996 (1974); *accord Brandywine-Main Line Radio, Inc.*

v. FCC, 473 F.2d 16 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973); *Trinity Methodist Church v. Federal Radio Commission*, 62 F.2d 850 (D.C. Cir. 1932), *cert. denied*, 288 U.S. 599 (1933); Hardy & Secrest, *Religious Freedom and the Federal Communications Commission*, 16 Val. U.L. Rev. 57 (1981).

Requiring the FCC to justify investigations undertaken in response to allegations of fraud by one of its licensees, religious or secular, is not supported by precedent, is impracticable, and might raise other first amendment obstacles. *See, e.g., Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 792-93 (1973) ("A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion."). Allowing such an investigation of a broadcast station, however, does not necessarily mean that the investigation may be open ended. During the investigation, free expression conflicts may arise. This brings us to the second level of our analysis which pertains to the acts of the FCC in relation to Scott. When a collision between portions of an FCC investigation and free exercise rights occurs, free exercise rights can be protected by requiring the FCC to demonstrate a compelling governmental interest. A compelling governmental interest must be shown at that point because an action taken in the course of an investigation directly conflicts with a sincerely held religious belief. *See generally EEOC v. Pacific Press Publishing Association*, 676 F.2d 1272 (9th Cir. 1982) (government's compelling interest in ensuring equality in employment opportunity justified burden on exercise of religious publisher's policy prohibiting suits by members against the church).

Here, we conclude that it is necessary to employ compelling state interest analysis because of the unique factual setting. The FCC requested information, the release of which

Scott alleges in and of itself violates his religious free exercise right. Thus, there is a direct conflict between a sincerely held religious belief and an action by government officials. As stated by the Fifth Circuit in examining employment policies at a religiously-affiliated college, "the relevant inquiry is not the impact of the [government action] upon the institution, but the impact of the [government action] upon the institution's exercise of its sincerely held religious beliefs." *EEOC v. Mississippi College*, 626 F.2d 477, 488 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981).

Therefore, we conclude that we can affirm the district court's order granting summary judgment only if the FCC's demand for the records of Scott's donations does not infringe on his first amendment freedoms or, if it does, a compelling governmental interest justifies the demand. *Sherbert v. Verner*, 374 U.S. 398, 406-07 (1963); *see Wisconsin v. Yoder*, 406 U.S. 205, 220-21 (1972). *Id.* at 215.

In support of his claim, Scott submitted personal affidavits in which he states that he believes that his church contributions are "sacrifices" and that disclosure of his sacrifices would violate their sacred nature. The government employees do not challenge the sincerity of Scott's beliefs. *See generally United States v. Ballard*, 322 U.S. 78 (1944). Furthermore, Scott's claim is not "so bizarre, so clearly non-religious in motivation, as not to be entitled to protection under the Free Exercise Clause." *Thomas v. Review Board of the Indiana Employment Security Division*, 40 U.S. 707, 715 (1981) (*Thomas*). We therefore conclude that the FCC's demand interferes with Scott's first amendment rights.

The conclusion that there is conflict between Scott's beliefs and the demand imposed by the FCC is "only the beginning, however, and not the end of the inquiry. Not all burdens on religion are unconstitutional." *United States v.*

Lee, ___ U.S. ___, ___, 102 S. Ct. 1051, 1055 (1982); *see Braunfeld v. Brown*, 366 U.S. 599 (1961); *Prince v. Massachusetts*, 321 U.S. 158 (1944). The state may justify its infringement on religious liberty if it is necessary to accomplish an overriding governmental interest. *United States v. Lee*, *supra*, ___ U.S. at ___, 103 S. Ct. at 1055; *Thomas*, *supra*, 450 U.S. at 718; *Wisconsin v. Yoder*, *supra*, 406 U.S. at 215; *Sherbert v. Verner*, *supra*, 374 U.S. at 406; *see also EEOC v. Pacific Press Publishing Association*, *supra*, 676 F.2 at 1279 ("In determining whether a neutrally based statute violates the free exercise clause, courts must weigh three factors: (1) the magnitude of the statute's impact upon the exercise of the religious belief, (2) the existence of a compelling state interest . . ., and (3) the extent to which recognition of an exemption from the statute would impede the objectives sought to be advanced by the state."). We must therefore determine whether the governmental interest in preventing the fraudulent practices alleged is sufficiently compelling to justify the burden upon Scott's right to the free exercise of his religion and, if so, whether the demand for church records of Scott's pledges and donations was necessary to further that interest. Whether a governmental interest is or is not compelling is a question of law. *See United States v. Lee*, *supra*, ___ U.S. at ___, 102 S. Ct. at 1055-56; *Thomas*, *supra*, 450 U.S. at 718-19.

The governmental interest in preventing some crimes is compelling, *see Prince v. Massachusetts*, *supra*, 321 U.S. at 166-67, but that interest is not sufficient to permit interference with free exercise rights in every case. *See Wisconsin v. Yoder*, *supra*, 406 U.S. at 215. The Supreme Court has repeatedly stated that religious frauds can be penalized. *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940) (dictum) ("Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may,

with impunity, commit frauds upon the public. Certainly penal laws are available to punish such conduct."); *Schneider v. State*, 308 U.S. 147, 164 (1939) (dictum) ("fraudulent appeals may be made in the name of charity and religion . . . [which] may be denounced as offenses and punished by law"); *see United States v. Ballard, supra*, 322 U.S. at 95 (Jackson, J., dissenting) ("religious leaders may be convicted of fraud for making false representations on [some] matters . . . as for example if one represents that funds are being used to construct a church when in fact they are being used for personal purposes"). Lower courts have applied this principle to religious organizations conducting fraudulent non-religious activities. *see SEC v. World Radio Mission, Inc.*, 544 F.2d 535 (1st Cir. 1976), *disapproved on other grounds, Aaron v. SEC*, 446 U.S. 680, 687 n. 7 (1980), and to individuals soliciting money for pretended religious purposes when religious beliefs were not sincerely held, *see People v. Estep*, 346 Ill. App. 132, 104 N.E.2d 562, *writ dismissed*, 413 Ill. 437, 109 N.E.2d 762 (1952), *cert. denied*, 345 U.S. 970 (1953); *People v. Le Grande*, 309 N.Y. 420, 131 N.E.2d 712 (1956), and have concluded that the protections of the first amendment were not applicable.

Here, however, we face the question whether, when an allegedly fraudulent activity is connected with the exercise of sincerely held religious beliefs, the governmental interest in preventing fraud overrides the individual's right of religious freedom. We conclude that the answer depends, at least in part, on the nature of the fraud. We recognize that the protections of the free exercise clause do not "turn upon a judicial perception of the particular belief or practice in question. . . . Courts are not arbiters of scriptural interpretation." *Thomas, supra*, 450 U.S. at 714, 716; *cf. United States v. Ballard, supra* (courts may inquire into sincerity,

but not truth or falsity, of religious tenets). This case does not involve only an allegation that Scott made certain pledges during his broadcast, but failed to pay them. The FCC investigation centered on allegations that Scott had solicited funds for certain specific projects which had never been undertaken. *See id.* at 95 (Jackson, J., dissenting). Scott claims that in the framework of his religion, it is only important that the contributor give and, having made the gift, the contributor is spiritually blessed, not matter how his donation is used. Scott further states that he must follow "the leanings of the Lord" with respect to the utilization of donations. Scott does not claim, however, that contributors to identified projects know that their contributions may be used for any purposes which Scott determines to be in accordance with the will of the Lord. Scott does not claim that he clarified this aspect of his religious practice in his broadcast solicitations. At least under these limited circumstances, we conclude that the government has a compelling interest in preventing the diversion of funds from the specifically identified projects for which they have been solicited.

Our final inquiry is whether the government's investigation of Scott's pledge and donation records was necessary to further this compelling interest. We need not determine whether any other aspects of the FCC investigation were justifiable, for Scott contests only the FCC demand for those records. Although not every allegation of fraudulent solicitation would justify the government's interference with the religious practices of individuals and churches, we conclude that the allegations here justified the FCC's narrow and limited inquiry into Scott's donation records.

Several important considerations support this conclusion. First, we believe that the context in which the pledges were made is significant. When Scott and the church decided to

acquire television and radio stations, they availed themselves of facilities which, under congressional mandate, must be operated in the public interest. 47 U.S.C. §§ 307(a), 309(a). With respect to the operation of broadcast facilities, the Supreme Court has held that the right of viewers and listeners, not that of broadcasters, is paramount. *Columbia Broadcasting System, Inc. v. Democratic National Committee, supra,* 412 U.S. at 102, *citing Red Lion Broadcasting Co. v. FCC, supra,* 395 U.S. at 390; *see also Writers Guild of America, West, Inc. v. America Broadcasting Co.,* 609 F.2d 355, 362 (9th Cir. 1979), *cert. denied,* 449 U.S. 824 (1980). An allegation of fraud, even if not sufficiently specific or reliable generally to justify inquiry into solicitations made by a congregation in church, may nevertheless be sufficient to justify inquiry into broadcast solicitations.

Second, the FCC investigation in this case was premised on information sufficiently reliable to justify the limited intrusion on first amendment rights which it engendered. The FCC began its inquiry only after it received a complaint signed by Diederich, a former employee of the television station. In his former employment, Diederich was in a position in which he was likely to have received personal knowledge of the irregularities he alleged. His signed complaint, if knowingly false, could expose him to liability in tort for malicious prosecution, *see, e.g., Morfessis v. Baum,* 281 F.2d 938, 940 (D.C. Cir. 1960); *Hardy v. Vial,* 48 Cal. 2d 577, 580-81, 311 P.2d 494, 496-97 (1957); *Dixie Broadcasting Corp. v. Rivers,* 209 Ga. 98, 70 S.E.2d 734 (1952) (action before FCC), and was therefore entitled to a greater inference of reliability than an unsigned statement would have been. Furthermore, before they sought to inspect church records, the government employees conducted several interviews in which they received information to support Diederich's allegations. Certainly, governmental agencies must

be wary of complaints which cannot be investigated without interfering with first amendment rights. Malicious or unsubstantiated allegations could easily be used to harass unpopular religions and their leaders. We are satisfied, however, that the information upon which the FCC acted was sufficiently reliable to justify its investigation.

Third, the investigation in this case was narrow and avoided any unnecessary interference with the free exercise of religion. We can imagine circumstances in which the interference with religion could be substantial enough to overbalance a governmental interest that otherwise would be compelling, but that is not this situation. There was no request for wholesale investigation of the church's financial records, but rather specific requests for records of an FCC licensee concerning Scott's salary and donations, both of which he allegedly misrepresented during broadcast solicitations. The added request, not challenged here, for access to the video tapes of broadcast solicitations and church records detailing the receipt and expenditure of publicly solicted funds also demonstrates the limited focus of the investigation.

Finally, the FCC's demand for access to Scott's donation records was necessary to serve its compelling interest in investigating the alleged diversion of funds. If, as alleged, Scott solicited funds for projects which were never undertaken or if funds contributed to those projects were illegally diverted to other uses, Scott's misrepresentation of his personal pledges may have been intended to induce those contributions and therefore could constitute part of a scheme to defraud. Although other information might be only tangentially relevant to the objectives of a legitimate inquiry, the nexus between the investigations and the FCC's objective in this case was sufficiently close to comply with the principle that valid restrictions on first amendment rights must embody the least restrictive means of effectuating the

government's compelling interest. *See Thomas, supra*, 450 U.S. at 718; *Sherbert v. Verner, supra*, 374 U.S. at 407, *citing Shelton v. Tucker*, 364 U.S. 479, 487-90 (1960). *See generally United States v. Lee, supra*, ___ U.S. at ___, 102 S. Ct. at 1056 ("Religious beliefs can be accommodated, but there is a point at which accommodation would 'radically restrict the operating latitude of the legislature.' ", *quoting Braunfeld v. Brown*, 366 U.S. 599, 606 (1961)) (citation omitted).

VII

Scott also claims that the actions of the government employees violated the establishment clause of the first amendment. He apparently believes that inquiry into his donation record is only the first step in a contemplated program of pervasive regulation. The government employees have submitted affidavits in which they state that their inquiries were for the purpose of ascertaining the truth of Diederich's allegations and determining whether renewal of the church's license was in the public interest. Scott has alleged no facts from which we can infer that pervasive regulation is either planned or threatened. The government employees were therefore entitled to summary judgment on the establishment claim. *Angel v. Seattle-First National Bank, supra*, 653 F.2d at 1299; *Marks v. United States, supra*, 578 F.2d at 262-63.

We hold that the government employees have not unjustifiably violated Scott's first amendment rights, and therefore do not reach the question of immunity. *See generally Butz v. Economou, supra* (absolute and qualified immunity); *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (qualified immunity).

AFFIRMED.

APPENDIX C.

Order.

EXHIBIT B.

United States Court of Appeals for the Ninth Circuit.

Reverend M. Eugene Scott, PhD., Plaintiff-Appellant, vs. Joel Rosenberg, et al., Defendants-Appellees. No. 81-5387, D.C. No. CV 78-3132 AAH.

Filed: June 20, 1983.

Appeal from the United States District Court for the Central District of California.

Before: WALLACE, SCHROEDER and CANBY, Circuit Judges

The panel as constituted above has voted to deny the petition for rehearing, to deny the motion for reconsideration of appellant's motion to vacate, and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, the motion for reconsideration is denied, and the suggestion for rehearing en banc is rejected.

APPENDIX D.

Order.

Supreme Court of the United States.

Reverend W. Eugene Scott, Petitioner, vs. Joel Rosenberg, et al. *No.* A-181.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner.

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 3, 1983.

/s/ William H. Rehnquist
Associate Justice of the Supreme
Court of the United States

Dated this 16th
day of September, 1983.

APPENDIX E.

Provisions Involved.

1. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

— United States Constitution, Amendment I

2. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

— United States Constitution, Amendment V

Rule 60. Relief from Judgment or Order

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his

legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.